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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE UNITED STATES DEPARTMENT OF THE ARMY,
Petitioner,
v.
BLUE FOX, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN SUBCONTRACTORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID R. HENDRICK
Counsel of Record
STEPHANIE M. WARSHAL
HENDRICK, PHILLIPS, SCHEMM & SALZMAN
1800 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1514
(404) 522-1410

JOEL S. RUBINSTEIN
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington DC 20036
(202) 466-6300
Counsel for American Subcontractors Association

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BRIEF OF THE AMERICAN SUBCONTRACTORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The American Subcontractors Association ("ASA") is a national trade association representing approximately 6,000 member companies doing business in virtually all states, who employ approximately 100,000 employees engaged in the construction business. Its members comprise businesses of all sizes which, as subcontractors, suppliers, fabricators and manufacturers, provide labor, materials and services on public and private construction projects throughout the United States.

[1] This brief was authored in whole by David R. Hendrick, Esq., Stephanie M. Warshal, Esq. and Joel S. Rubinstein, Esq., counsel for the American Subcontractors Association, *Amicus Curiae*. No person or entity other than the American Subcontractors Association has made a monetary contribution to the preparation or submission of this brief. Letters of consent as required by Supreme Court rule 37.3 are appropriately filed with the clerk of this court.

This issue now before the Court involves protection of a subcontractor's right to secure payment for work performed on a federal public works project by impressing an equitable lien on contract funds held by the public owner, which the general contractor is financially unable to pay, the statutorily required Miller Act payment bond is non-existent or otherwise insufficient to effect payment, and the public owner benefitting from the subcontractor's work is aware of the non-payment and is yet holding funds dedicated to that construction contract. This Court's decision will have significant impact on the subcontractor community. Therefore, ASA presents this Amicus Brief to underscore the legitimate and compelling interests of the Respondent, Blue Fox, Inc., and of subcontractors generally, in the validation of the established equitable principle allowing an unpaid subcontractor on a federal construction project to impress and enforce against contract monies held by the government an equitable lien to secure its right to payment. As an Association representing construction industry subcontractors, many of whom do business regularly on federal construction projects, the *Amicus Curiae* has a strong and abiding interest in a decision by this Court that would clearly serve the legislatively and judicially recognized interests in assuring payment to subcontractors for work properly performed for the benefit of the public by securing an equitable lien on contract funds earned, albeit indirectly, by such performance and held by the public owner of the project. Thus, ASA supports the position of the Respondent in this equitable lien action. ASA urges that the decision of the United States Court of Appeals for the Ninth Judicial Circuit now before this Court for review by writ of certiorari be affirmed.[2]

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[2] ASA is joined in the positions advanced in this Amicus Curiae brief by the following similar situated construction industry trade associations:

(a) The National Electrical Contractors Association, an organization of electrical construction specialty contractors, representing more than 53,000 electrical construction contracting firms.

(b) The Sheet Metal Air Conditioning Contractors National Association represents 4,500 contractors in the sheet metal and air conditioning industry.

(c) The Mechanical Contractors Association of America, Inc. represents 2,000 heating, air conditioning, refrigeration, plumbing, piping and service contractors.

(d) The Association of Wall and Ceiling Industries-International represents wall and ceiling contractors, manufacturers, suppliers/distributors and others allied to the fields of acoustics, drywall, EIFS, fireproofing, insulation, plaster, steel framing and stucco.

THE SUBCONTRACTOR'S PAYMENT DILEMMA— AN OVERVIEW

Considering the manner in which the industry operates, in today's market and economy, subcontractors are the largest single force and factor in the actual performance of labor on construction projects. In years past, the general contractors performed much of the work on the project with their own forces. Times have changed and general contractors, in order to reduce their risk, are acting more and more as labor brokers by subcontracting the lion's share of the work to their subcontractors. The significance of this evolving relationship is that subcontractors are the major contributors in the contract chain with the most dollars at risk. The struggle for payment between contractors and subcontractors is an ongoing dilemma for the industry. The public interest is best served by policies which ensure that subcontractors will be paid reasonably for their work.

Most of the labor and materials required for construction projects is generally provided by subcontractors, who do not have direct contractual relationship with or recourse against the owner of the project benefitting from such labor and materials incorporated into it. Subcontractors work behind the payment curve. On top of this, subcontractors are generally smaller more economically

fragile businesses which must receive prompt payment for their work in order to replenish their limited working capital to stay in business. Subcontractors necessarily incur the bulk of the cost of their performance as they proceed with their work, paying suppliers and laborers first out of current funds, irrespective of whether or when they actually receive payment for such work themselves. Then they later seek reimbursecent of such costs through the monthly or periodic progress payment process. There is often a substantial lag between when the subcontractor actually incurs these costs of performance and when its expended working capital is replenished by payment. As a practical matter, if subcontractors are functionally serving as bankers to a construction project, investing that limited working capital and hoping to be repaid, they should, like any banker, have appropriate security for their loans. This is especially true on public projects where the public at large benefits from the investment of the subcontractor's resources. Nevertheless, they commit their labor and resources to a project trusting that when their work has been incorporated into the project, they will get paid within a reasonable time.

Critical to the decision of subcontractors to furnish labor, materials and services is the assurance that they will ultimately receive payment for the benefits that they confer through their work on the project. Reflecting the impact on society and the business world which would result from chronic payment risk, there has evolved a substantial and recognized public policy which generally favors assurance of or security for payment of subcontractors in order to encourage their participation in the construction process. On private, non-governmental construction projects, such assurance is generally derived from the security for payment afforded by state mechanics and materialimans lien laws. A subcontractor is able to exercise such lien rights arising under state statutory law against the real property being improved with its labor

and materials as an essential means of ultimately securing the right to payment.

On a public project, however, there are generally no analogous statutory lien rights allowed against the improved public property itself. Legislatures have recognized the need to protect the interests of subcontractors and suppliers in obtaining payment for the labor, materials and resources invested in public works. Accordingly, the federal government, as well as all states, have enacted legislation requiring contractors on public projects to post payment bonds to ensure payment of subcontractors. On federal projects, such as that at issue here, such protection is afforded by the Miller Act, 40 U.S.C. § 270a, *et seq*. Subcontractors enter into contracts for federal public works projects with the reasonable expectation that their interest in payment for the labor, materials and services provided in building public works will be adequately secured by such a statutory payment bond. This Act is for the especial protection of the subcontractor on a government construction project by providing security assuring their payment. This security is critical to the decision of subcontractors and suppliers to furnish labor, materials and services.

The Miller Act, and many similar state laws, fail to directly address whether and in what form the subcontractors are afforded recourse when either an invalid payment bond is posted or no payment bond is posted at all. In the instant case, the Ninth Circuit recognized that the Miller Act's silence regarding a remedy for subcontractors in such a circumstance does not extinguish a subcontractor's right to equitable relief directed, not against the public entity itself or the "public purse," but rather as an equitable lien against funds already dedicated to pay for the construction services and held by the public owner.

ASA urges that the limited form of "security" for payment on public works projects allowed by the Court of Appeals below reasonably balances and protects the legiti-

mate public interest, on one hand, of avoiding unpredictable claims being asserted against public coffers, while, on the other hand, serves the countervailing and equally compelling public interest of assuring that subcontractors participating in public construction projects will receive payment that they have honestly earned.

SUMMARY OF ARGUMENT

Federal and state courts have recognized the equitable lien doctrine and have applied the doctrine to permit a subcontractor on a public works project, where no valid payment bond was obtained and the general contractor failed to pay the subcontractor, to recover directly from contract funds held by the public owner. To hold otherwise is to allow the public owner to be unjustly enriched by the subcontractor's work. This equitable remedy does not violate the Administrative Procedures Act, as the relief sought by the subcontractor is not "money damages" or uncommitted money from the Treasury, but instead is drawn from funds held by the public owner specifically for the construction project and the benefit of those working on it. This equitable lien claim is simply an equitable action to recover the very thing to which the subcontractor is entitled—the contract funds held by the public owner for its payment.

ARGUMENT

I. PUBLIC POLICY PREDICATED UPON FAIRNESS AND EQUITY SUPPORTS APPLICATION OF EQUITABLE LIEN DOCTRINE

Synthesizing what appear to be uncontested facts underlying this dispute as set forth by the Court below and in the "Brief for Petitioner" and the "Brief for the Respondent", it appears that substantial equities flow in favor of the Respondent in this matter, Blue Fox, Inc. ("Blue Fox"). That is where this *Amicus Curiae* submits that inquiry should begin.

Clearly, this construction project by the United States Department of the Army was subject to the requirements of the federal Miller Act, 40 U.S.C. 270a, *et seq*. Accordingly, the prime contractor was required to furnish, *inter alia*, the statutorily required "payment bond . . . for the protection of all persons supplying labor and materials." 40 U.S.C. § 270a(a)(2). The Respondent would, and should, have been an interested beneficiary entitled to the assurance of payment afforded by such a payment bond. As this Court has explained, "the Miller Act was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects [citation omitted] because 'a lien cannot attach to government property,' persons supplying labor and materials on a federal construction project were to be protected by a payment bond." *J.A. Bateson Company v. United States* ex rel *Board of Trustees of National Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586, 589 (1978). This whole remedial scheme, however, fails of its essential purpose if the required payment bond is not procured by the prime contractor or if the bond procured is ultimately determined to be financially insufficient due to the failure, insolvency, or inability to find the surety on the bond.[3]

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[3] *Amicus Curiae* acknowledges the limited access that has been afforded subcontractors and suppliers to assert direct claims for money damages against the federal government and federal government employees when a Miller Act payment bond fails or is not obtained. *See, Blue Fox Inc. v. Small Business Association*, 121 F.3d 1357 (1997) (dissent); *Hardaway Company v. U.S. Army Corps of Engineers*, 980 F.2d 1415 (11th Cir. 1993); *West Bay Steel, Inc. v. United States*, 970 F.2d 648 (9th Cir. 1992); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). However, the existence of the statutory remedy provided by the Miller Act against a surety does not preclude other remedies which may exist under common law and equitable remedies against the government. *See, Arvanis, supra.* Many states have acknowledged this entitlement of a subcontractor to some form of relief when a payment bond on a public project fails or is not obtained either by statute, common law, or both. Among the state court holdings that a public owner and/or public

Of course, the Petitioner, here, was the singular party to this chain of contractual relationships that was in the best position to assure that a Miller Act payment bond was properly furnished as statutorily required. The Petitioner, in fact, was the *only* party with the requisite knowledge and authority to require that such payment bond be furnished. However, in the instant matter, it appears not only that the Petitioner failed to assure that the required payment bond was furnished to afford payment protection of subcontractors, including the Respondent, but, more significantly, it also appears that the Petitioner improperly and intentionally sought to avoid the Miller Act payment bond requirement without setting in place the several alternative processes permitted to protect the payment rights of the subcontractors. This conscious avoidance of the Miller Act bonding requirements goes beyond mere oversight or inadvertence—or even negligence. The Petitioner

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official is liable in damages to an unpaid subcontractor providing labor, material or services to a public works project where the statutory "little Miller Act" payment bond is not furnished or required or proves to be fraudulent, insolvent or insufficient to satisfy the payment obligations are: *Hall County School District v. C. Robert Beals & Associates*, 498 S.E.2d 72 (Ga. 1998); *Palm Beach Co. v. Trinity Industries, Inc.*, 661 So.2d 942 (Fla. DCA 4th 1995); *DeKalb County v. J&A Pipeline Company, Inc.*, 437 S.E.2d 327 (Ga. 1993); *Kammer Asphalt v. East China Township Schools*, 504 N.W.2d 625 (Mich. 1993); *National Oil & Supply, Inc. v. Voaughts, Inc.*, 856 S.W.2d 912 (Mo. Ct. App. 1993); *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.*, 601 N.E.2d 972 (Ill. App. 1992); *Threlkeld-Covington, Inc. v. Baker Drywall Co., Inc.*, 837 S.W.2d 840 (Tx. App. 1992). States expresly providing a statutory right of action by subcontractors against public owners who fail to secure a payment bond from the general contractor on public works include Georgia (O.C.G.A. § 36-82-102); Idaho (Idaho Code § 54-1928); Iowa (Iowa Code § 573.2); Minnesota (Minn. Stat. § 574.28); Montana (Mont. Code Ann. § 18-2-202); Oregon (Or. Rev. Stat. § 279.542); South Dakota (S.D. Codified Laws § 5-21-2); Utah (Utah Code Ann. § 14-1-19); and Washington (Wash. Rev. Code § 39-08.015).

apparently knowingly and intentionally sought to waive or avoid the payment bond requirement without affording subcontractors any alternative security or assurance, or even affording them the courtesy of clear advance notice of the absence of the payment bond protection which would otherwise have been normally anticipated.

Respondent prosecuted and completed its subcontract scope of work by May of 1994, at which time it was owed by the prime contractor a final subcontract balance of $46,586.14. When no payment of this balance due was received from the prime contractor, Respondent gave written notices of the nonpayment to the Petitioner on May 26 and June 15, 1994. On or about June 15, 1994, Respondent first was informed that no Miller Act payment bond had been furnished. The Petitioner was then yet holding $171,042.85 in unpaid prime contract funds. Respondent requested that Petitioner suspend or reduce further payment to the prime contractor to assure payment of this subcontract balance. To the contrary, however, the Petitioner proceeded to disburse over the next several months an additional $86,132.33 out of such contract funds to the prime contractor (likely including portions attributable to Respondent's subcontract performance). The Petitioner apparently took no action to enforce pass through of such payment and Respondent received nothing. Eventually, several months later, Petitioner terminated the prime contract while $84,910.50 of contract funds were still held by Petitioner, noting that one of its most severe iterms of concern was the failure by the prime contractor to pay the $46,586.14 due its subcontractor, the Respondent—perhaps in its belated recognition of the consequences upon Respondent arising out of Petitioner's ongoing failure to protect that subcontractor's right to payment. Respondent now asserts that it is entitled to impress an equitable lien on the contract funds held by Respondent at the time of notice of nonpayment and, if not then, at the time of termination due to that very nonpayment.

Were such unpaid subcontractors left without "equitable lien" recourse against contract funds held by the public owner and dedicated for use in payment for construction services provided benefitting the project, the public owner would actually have a disincentive to require a payment bond, with its attendant extra cost, or to declare a prime contractor in default for failure to post a proper payment bond with the attendant delay, disruption and expense to the public works project. If the legal consequences on the public owner were as advocated here by the petitioner —namely no exposure whatsoever under legal, contractual, statutory or equitable grounds—then the unpaid subcontractor's plight would be as described in the dissent of Judge Ryner in the Ninth Circuit's decision below, namely "the hapless subcontractor . . . left holding the bag." *Blue Fox, Inc. v. Small Business Administration,* 121 F.3d 1357, 1363 (9th Cir. 1997) (quoting from *Automatic Sprinkler Corp. v. Durla Envt'l. Specialists, Inc.,* 53 F.3d 181, 182 (7th Cir. 1995)). Conversely, ASA urges on behalf of its subcontractor members and the Respondent herein that this Court take the opportunity in resolving this case to complete the picture only roughly suggested in *United States v. Munsey Trust Co. of Washington, D.C.,* 332 U.S. 234, 242 (1947) by the dictum that "[w]e need not decide whether laborers and materialmen would have any claim to the retained percentages, if both contractor and surety failed to pay them." This picture was further developed in this Court's decision in *Pearlman v. Reliance Insurance Company,* 371 U.S. 132, 141 (1962) in which it held that "the laborers and materialmen had a right to be paid out of the [retained contract] fund." The Ninth Circuit, in the decision below, has decided this issue in the affirmative, invoking application of the "equitable lien" doctrine, in its well reasoned majority opinion, and this *Amicus Curiae* submits that this result is reasonable, equitable and fully supportable under the guidance of the following body of established precedent. Allowing enforcement of an equitable

lien against the withheld contract funds comports with the equitable principles deeply embedded in our jurisprudence and accomplishment of the ends of substantial justice. *Cf. Pearlman v. Reliance Insurance Company,* 371 U.S. 132 (1962).

II. BLUE FOX HAS AN ENFORCEABLE EQUITABLE LIEN AGAINST THE CONTRACT MONIES HELD BY THE GOVERNMENT AFTER NOTICE THAT VERDAN HAD NOT PAID BLUE FOX

"An equitable lien arises '[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched.'" *Embree Construction Group, Inc. v. Rafcor, Inc.,* 411 S.E.2d 9616 (N.C. 1992), quoting Restatement of Restitution § 161, "It would be manifestly unjust for an owner to withhold final payment from the contractor out of concern for the subcontractors and then disregard the subcontractors' interests by failing to distribute the retainage. In such a case there can be no doubt that equity and justice would recognize the subcontractors' claims against the contract balance." *Willard, Inc. v. Powertherm Corp.,* 444 A.2d 93, 97-98 (Pa. 1982); see also Restatement of Restitution § 160 (1937).

The equitable lien doctrine has been recognized as conferring rights on unpaid subcontractors on public works projects under both state and federal law. A number of state courts have applied this principle to protect the interests of subcontratcors providing services on public works. *See, e.g., Architectronics, Inc. v. Salem-American Ventures, Inc.,* 350 So.2d 581 (Fla. 2nd DCA 1977); "The doctrine of equitable liens came into existence to remedy those situations where, as here, there is either an absence of an available lien or no adequate remedy at law." *Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc.,* 423 So.2d 500 (Fla. 3rd DCA 1982). The equitable lien doctrine arises "out of a general considera-

tion of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case." *Id.* Courts have found the doctrine applicable both in instances where there the subcontractor has a statutory right to recover from the public owner where no valid payment bond has been obtained, and where no such right exists. The Georgia Supreme Court has recently recognized an unpaid subcontractor's "equitable lien" claim seeking to enforce a lien "against funds which are being held by the Appellant [the public owner]." *DeKalb County v. J.A. Pipeline Co., Inc.*, 437 S.E.2d 327, 333 (Ga. 1993). That court rejected a sovereign immunity defense by distinguishing an equitable lien claim as one not seeking to impose any liability against the public owner, but rather only as an equitable remedy against contract funds themeselves held by the public owner. *Accord, Hall County School District v. C. Robert Beals & Associates*, 498 S.E.2d 72 (Ga. 1998). In Colorado, the Colorado Court of Appeals held in *First National Bank of Paonia v. K.N.J., Inc.*, 867 P.2d 152, 155 (Colo. Ct. App. Div. V, 1993) that an unpaid subcontractor on a United States Forest Service contract, "[i]n addition to a remedy under the Miller Act, . . . holds an equitable lien on any earned, yet unpaid contract funds." Further, the court noted that this "equitable right of material suppliers and laborers extends to money payable under the contract that is still in the hands of the United States." *Id.* The Massachusetts Supreme Court has recognized the particularly equitable claim of those responsible for completion of building contracts to be paid from available monies ahead of others whose claims come from the mere advance of money, which may be enforced by way of a "constructive trust" claim.[4] *Superior*

[4] Analogously, other courts have reached essentially the same result by employing a "constructive trust" theory to afford claims by unpaid subcontractors on government construction projects against contract funds held by the public owner or traceable to a third party. *E.g., Kammer Asphalt Paving Co., Inc. v. East China Township Schools*, 504 N.W.2d 635 (Mich. 1993); *First Bulloch & Trust Company v. Inca Materials, Inc.*, 880 F.2d 1307 (11th Cir. 1989); *Bethlehem Steel Corporation v. Tidwell*, 66 B.R. 932 (U.S.D.Ct., M.D. Ga. 1986); *United Parcel Service Inc. v. Weber Industries, Inc.*, 795 F.2d 1005 (5th Cir. 1986); *United Pacific Insurance Co. v. Ripsom*, 1984 W.L. 8269 (Del. Chancery Court, 1984) (surety's equitable lien against unpaid contractor funds arises out of a constructive trust in favor of laborers, materialmen and subcontractors by subrogation upon payment by the surety); *Selby v. Ford Motor Company*, 590 F.2d 642 (6th Cir. 1978) (applying Michigan law).

Glass Company, Inc. v. First Briston County National Bank, 406 N.E.2d 672 (Mass. 1980). The Florida Court of Appeals recognized, in a private construction project context, that the "equitable lien doctrine is firmly established in Florida" to benefit an unpaid subcontractor or supplier by allowing recourse against unpaid contract funds in *Peninsular Supply Company v. C.B. Day Realty of Florida*, 423 So.2d 500, 503 (Fla. App. 3d Dist. 1982). In *General Acrylics v. USF&G*, 623 P.2d 839 (Ariz. App. 1980), the Arizona Court of Appeals acknowledged that laborers and materialmen have an equitable lien as to funds in the hands of the government which are earned but unpaid.

This equitable lien concept has been applied in the context of federal public works as well. In *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 410 (1908), this Court stated that the government has an equitable obligation to ensure the payment of laborers and suppliers on government construction projects. This Court found again in *Pearlman v. Reliance Insurance Company*, 371 U.S. 132, 141 (1962), that laborers have the right to be paid out of any unpaid contract balance when an insolvent general contractor fails to pay them for their work. In both of these cases, the Court recognized that sureties who have compensated the unpaid laborers and suppliers have a similar claim against the unpaid subcon-

tract balance, which claim would be superior to claims of the insolvent general contractor in bankruptcy and its creditors in bankruptcy. Such a claim would arise because the surety is subrogated to the rights of the laborers and suppliers. *Henningsen v. United States Fidelity & Guaranty Co., supra,* at 410.

If the surety is subrogated to the unpaid laborers' and suppliers' rights, it is readily apparent that those selfsame unpaid laborers and suppliers have a claim against the unpaid subcontract balance. It would make no sense whatsover to allow a surety to claim superiority while disallowing such a claim—indeed a right—to an unpaid laborer or supplier.

The rights of subcontractors to claim a lien arise by operation of law; that is, they arise out of the equitable principles protecting unpaid federal subcontractors. This Court has recognized the equitable doctrine that when a payment bond surety satisfies the claims of unpaid laborers and suppliers, including subcontractors, on a federal building project, the surety is subrogated to their rights to claim payment out of the contract balance still owed by the government. *Prairie State Bank v. United States,* 164 U.S. 227 (1896); *Henningsen v. United States Fidelity & Guaranty Co., supra,* at 410. In *Pearlman v. Reliance Insurance Co., supra,* this Court rejected the argument that the Miller Act was intended to repudiate the equitable principles recognized in *Prairie State Bank* and *Henningsen.*

Decisions by three different Circuits have recognized that a subcontractor's right to claim a lien against monies held by the government should rise to at least the same level as those rights that a surety may claim as set forth in *Prairie State Bank* and *Henningsen.* These decisions are: *Wright v. U.S. Postal Service,* 29 F.3d 1426 (9th Cir. 1994); *Active Fire Sprinkler Corp. v. U.S. Postal Service,* 811 F.2d 747 (2nd Cir. 1987); and *Kennedy Electric Co., Inc. v. United States Postal Service,* 508

F.2d 954 (10th Cir. 1974).[5] As stated in *Kennedy Electric Co., Inc., supra,* ". . . there is no discernible difference between the equities of the sureties, which were upheld in *Prairie State Bank* and *Henningsen,* and the equities of the subcontractor. . . ." *Id.* at 960. In *Active Fire Sprinkler Corp., supra,* at 755, the court observed that the subcontractor:

> . . . asserts that it had equitable rights in the Contract Balance held by USPS at the time this suit (the Lien Action) was commenced. We agree. *It is not new law that unpaid subcontractors hold an equitable interest in a contract balance owed by a building owner to a general contractor.* (Emphasis added) (Citations omitted.)

It is not necessary to rely on cases involving the United States Postal Service, where sovereign immunity was expressly waived, to find decisions which recognize that subcontractors on federal projects other than the Postal Service have an equitable lien on the unpaid balance. In *Trans-Bay Engineers and Builders, Inc. v. Hills,* 551 F.2d 370, 382-83 (D.C. Cir. 1976), the court approved the doctrines of uniust enrichment and equitable lien as a matter of federal common law and held that these doctrines were available to private parties seeking equitable relief against the government. *See also, e.g., Bor-Son Building Corp. v. Heller,* 572 F.2d 174, 178 (8th Cir. 1978), wherein the court held that the use of a "sue and be sued" clause rearding sovereign immunity waived immunity from suit in a claim for monetary relief based on theories of quantum meriut, equitable lien, constructive trust, unjust enrichment and joint venture. While this Court has clearly recognized a path for relief under an

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[5] While these decisions ultimately permitted an action against the Postal Service because the Postal Service Act had waived sovereign immunity for suits against the Postal Service, these cases nevertheless recognize the concept that the unpaid subcontractor has an equitable lien against the unpaid balance held by the government.

equitable lien doctrine for payment bond sureties asserting the subrogated rights of subcontractors and suppliers that surety has paid, the same path must be available for direct recourse against contract funds held by the public owner by an unpaid subcontractor on its own behalf where no statutory payment bond exists.

For the reasons explained above, and especially the language in *Active Springler*, subcontractors possess an equitable lien in the contract balance owed by the government to a contractor. The government apparently argues that despite the existence of this equitable lien, the subcontractor has no right to enforce this lien based on the doctrine of sovereign immunity.

III. THE REMEDY SOUGHT BY BLUE FOX IS EQUITABLE IN NATURE AND CAN BE GRANTED UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) waives sovereign immunity to the extent that it permits suits against the United States which seek "relief other than money damages." 5 U.S.C. § 702 (1977).

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), this Court considered a meaning of the exclusion in § 702 for suits seeking money damages The. Court held that the reversal of a disallowance decision by the Commissioner of Health and Human Services, resulting in payment of money by the United States, was not an award of "money damages." 487 U.S. at 893. This Court observed that "[T]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.* at 893. Rather, the relevant inquiry identified by this Court is whether the remedy is a "substitute for suffered loss" or "the very thing to which [the plaintiff] was entitled" in the first place. *See also, Katz v. Cisneros*, 16 F3d 1204 (Fed Cir. 1994), where the court stated that "plaintiff

sought payments to which it was allegedly entitled, not 'money as compensation for loss suffered.'"

Both the Second and Third Circuits have held that the lack of a statutory requirement that disputed payments be made directly to the plaintiff does not bar relief. In *Zellous v. Broadhead Associates*, 906 F.2d 94 (3rd Cir. 1990), the government had argued that damages sought were money damages even though the statute did not direct payment to the plaintiff. In *Linca Area Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034 (2nd Cir. 1995), the court held that damages were not "money damages" even though the statute did not explicitly require the Immigration and Naturalization Service to repay expenses incurred by a carrier.

The equitable subrogation cases are analogous, and the government incorrectly notes that none of these cases even involved a claim against the government. The government argues that all of these involved contests between private parties or refunds as to which the United States had disclaimed any ownership and had transferred out of the Treasury. The government is simply wrong. In *National Surety Corporation v United States*, 118 F.3d 1542 (Fed. Cir. 1997), the disagreement was between a performance bond surety of a defaulted government construction contractor and the government. In that case the government did not withhold the required ten percent retention from progress payments as the contract with the defaulted contractor had required. Instead, it made full payment to the contractor which ultimately abandoned the project and thereafter was terminated for default. National Surety filed a claim for the funds that were required to have been retained by the government from progress payments but were instead paid to the insolvent general contractor. Based upon *Prairie State National Bank, supra*, the Court stated that it had long recognized the surety's rights to subrogation, observing that the subrogation right is equitable in origin and in implementation. *Id.* at 1546.

The Second Circuit's decision in *Aetna Casualty & Surety Company v. United States*, 71 F.3d 475 (2nd Cir. 1995), is directly on point. The surety brought suit against the government alleging that it was subrogated to the government's rights against the corporation and that the government tortiously converted the surety's property when it failed to assert an off-set against the tax refund payable to the corporation, which was a principal under the bond. The court rejected the argument that Aetna's amended complaint sought "money damages" which were not allowable under the APA. The court noted that the suit was not for damages "to compensate for the government's failure to pay a duty. Rather, it seeks to require the government to perform its duty—that is, to pay to Aetna funds held by the government for Aetna's benefit." *Id.* at 478. The court concluded that because Aetna sought injunctive relief to force the government to perform a legal obligation, the action is not forbidden by the APA's bar on money damages. *Id.* at 479. In short, *Aetna* stands for the proposition that injunctive relief to compel performance of non-statutory legal obligations is permissible under the APA. The court observed:

> In our view, the Court referred to the question whether there was a statutory duty because in that case the plaintiff was claiming a statutory duty. The opinion rests not on the fact that the federal government's duty was statutory, but rather on a distinction between money damages, which seek to compensate for governmental failure to perform a legal duty, and injunctive relief requiring that the duty be performed. [Citations omitted]. We can see no reason why the *Bowen* holding should be limited to duties prescribed by statute as opposed to those arising under some other rule of law, any more than it should be limited to claims brought by Massachusetts.

Id. at 479.

Other cases are to the same effect. For example, in *Fireman's Fund Insurance Company v. United States*, 421 F.2d 706 (Ct. Cl. 1970), consistent with other case law, the government was held liable where it had notice of the supplier's suit against the surety and of the surety's objection to the government's final payment to the contractor. Under those circumstances payment to the contractor was improper and the government was liable to the surety for improper payment.

Section 702 of the APA acts as a general consent to suit requesting equitable relief from administrative action or inaction. *United States v. Mitchell*, 463 U.S. 206 (1983). In *Rosebud Sioux Tribe v. U.S. Bureau of Indian Affairs*, 714 F. Supp. 1546, 1555 (D.S.D. 1989), the court held that the interplay of § 702 and 28 U.S.C. §§ 1331, 1361 and 1362 provided a sufficient waiver of sovereign immunity and a grant of jurisdiction to entertain equitable claims.

The Postal Service cases are instructive not because of the "sue and be sued" provision but because the analysis in those cases concludes an equitable lien should be recognized under these precise circumstances. *See*, for example, *Wright v. United States Postal Service, supra.* Again, as noted in the preceding section, where the payment bond surety is offered a path to equitable relief against the public owner holding contract funds based on rights subrogated upon its payment of subcontractors and suppliers, those very same unpaid subcontractors and suppliers should not be procedurally foreclosed from asserting such an equitable lien on their own behalf.

Existence of a remedy at law does not deprive one of equity jurisdiction unless the remedy is clear, adequate and complete. *Pomeroy, Equity Jurisprudence*, § 165 (1994) (5th Ed.) describes an equitable lien as simply a right of a special nature over the thing, which constitutes a charge or encumbrance upon the thing, so that "the very thing itself" may be proceeded against in an

equitable action and either sold or sequestered under a judicial decree and its proceeds, in the one case, or its rights and profits, in the other, applied upon demand of the party in whose favor the lien exists. Of particular pertinence here, *Pomeroy* clearly delineates the distinction between equitable liens and money damages. It will be observed that the distinction *Pomeroy* draws is pertinent to this Court's decision in *Bowen* and, indeed, supports Blue Fox's assertion of an equitable lien as falling within the *Bowen* rationale. *Pomeroy* describes the equitable lien in the following terms:

> The remedies of equity are, as a class, specific. Although it is commonly said of them that they are not in rem, because they do not operate by the inherent force of the decree in an equitable suit to change or transfer the title or estate in controversy, yet these remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing—a tract of land, personal property, or a fund—rather than a right to recover a sum of money generally out of the defendant's assets.

Pomeroy, § 234.

Thus, as recognized in *Bowen*, an equitable lien represents a peculiar right over the thing concerning which the contract deals, and it operates directly upon that thing. Even when the controversy concerns pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject matter as a specific fund and by adjudging such fund to its single owner, or by apportioning it among the several claimants. *Pomeroy*, § 170. This reemphasizes the distinctive feature of an equitable lien in that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts and even money in the form of a fund and follows it through the hands of successive possessors as long as it can be identified. *Pomeroy*, § 170. In *Transamerica*

Insurance Company v. United States, 31 Fed. Cl. 532 (1994), the court ruled that a performance bond surety may bring an equitable subrogation action against the government noting that once the government is informed of the principal's default, it becomes a stakeholder in the contract balance; and since the balance is measured by the time of default, the assessment of liquidated damages cannot operate to defeat the surety's subrogation claim. Similarly, in *Transamerica Premier Insurance Company v. United States*, 32 Fed. Cl. 308 (1994), the surety recovered against the government under the doctrine of equitable subrogation where it had paid a materialman's claim.

In determining whether this court should recognize Blue Fox's equitable lien, the Tenth Circuit's weighing of equities in *Kennedy Electric Co., supra*, should be considered. There, the court found that the subrogated surety analogy was apt and stated:

> The cases such as *Fireman's Fund*, 421 F.2d 706, 19 Ct. Cl. 804, holding that the government cannot escape liability for wrongful payment, concerned Miller Act sureties. The principle is not changed by the fact that here we have an unpaid subcontractor rather than a surety. Department compounded its error in contracting without bond by wrongly paying to an assignee after notice for the subcontractor's cliam. It arrogated to itself determination of entitlement to the fund which it held. The subcontractor had a legally enforceable right against department. . . . The subcontractor has an equitable lien both on the funds remaining in service's hands and on the money wrongfully paid to the assignee.

Id. at 960.

Congress has consented to litigation in federal court seeking equitable relief from the government. *Pullman Construction Industries, Inc. v. United States*, 23 F.3d. 1166, 1168 (7th Cir. 1994). In *Pullman*, the Seventh

Circuit dealt with a civil taxation suit. However, it opined generally on the current status of sovereign immunity, particularly in light of the amendments to § 702 of the APA. The court observed:

> Now that 5 U.S.C. § 702 exposes the United States to equitable relief, it is difficult to speak of federal sovereign immunity as a 'right not to be sued.' It is quite unlike the Eleventh Amendment, which provides that '[t]he judicial power of the United States shall not be construed to extend' to suits against states, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602-05, which gives foreign governments' 'immunity from the jurisdiction' of our courts. The only portion of the United States' original immunity from suit that Congress continues to assert is a right not to pay damages—a right circumscribed by statutes such as § 106.

Id. at 1168.

The court's decision in *Aetna Casualty and Surety Company v. United States, supra,* 71 F.3d 475, is most instructive. When the government wrongfully pays money to which another has equitable lien, such as Blue Fox had over the balance owed Verdan, § 702 of the APA waives immunity for suit by the party whose equitable rights were violated. Whether the wronged party is a surety, as in *Aetna,* or an unpaid subcontractor, as is Blue Fox in this case, the result should be the same. There is no difference between the equities of the surety and the subcontractor. Thus, if the surety's claim to monies wrongfully paid by the government is an action for relief other than money damages, which it is, the subcontractor's own claim must be considered to be a suit for relief "other than money damages." Thus, Blue Fox's claim of an equitable lien falls squarely within the waiver of sovereign immunity set forth in § 702 of the APA. Since Blue Fox seeks to enforce its equitable lien over the monies held by the government, the suit is not one for money damages. Thus, § 702 of the APA waives sovereign immunity for claims such as Blue Fox.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Subcontractors Association respectfully requests that this Court affirm the judgment of the Ninth Circuit Court of Appeals below.

Respectfully submitted,

DAVID R. HENDRICK
Counsel of Record
STEPHANIE M. WARSHAL
HENDRICK, PHILLIPS, SCHEMM & SALZMAN
1800 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1514
(404) 522-1410

JOEL S. RUBINSTEIN
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington DC 20036
(202) 466-6300
Counsel for American Subcontractors Association

No. 97-1642

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
Petitioner,

v.

BLUE FOX, INC.
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1998, three copies of the Brief of The Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent Blue Fox, Inc., were served by prepaid postage, first class mail upon:

Seth Waxman, Esq.
Solicitor General
Room 5614
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for Petitioner

Thomas F. Spaulding, Esq.
Spaulding Cox & Schaeffer, LLP
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815
Counsel for Respondent

I further certify that all parties required to be served have been served.

Tami Lyn Azorsky
McKenna & Cuneo, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500